Date: July 22, 1997

Case No.: 95-INA-00366

In the Matter of:

BARBARA SAMUELS,
Employer

On Behalf Of:

ANNA ZAWISTOWSKA,
Alien

Appearance: Paul W. Janaszek, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On February 5, 1994, Barbara Samuels ("Employer") filed an application for labor certification to enable Anna Zawistowska ("Alien") to fill the position of Cook, Kosher (AF 3-4). The job duties for the position are:

> Prepares, seasons, and cooks soups, meats, vegetables, etc. according to the principles of Kosher Cuisines. Bakes, broils, and steam meat, fish and other food. Prepares Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo balls. Decorates dishes according to the nature of celebration. Purchases foodstuff and accounts for the expenses incurred.

The requirements for the position are two years of experience in the job offered and four years of high school.

The CO issued a Notice of Findings on September 19, 1994 (AF 35-38), proposing to deny labor certification because the job offered was not permanent, full-time employment. Accordingly, the Employer was notified that it had until October 24, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, dated October 20, 1994 (AF 39-48), the Employer outlined a work schedule that the cook would be required to follow, including the approximate preparation times. She indicated that the meals are prepared for three people. She further explained that her ex-husband previously did the cooking.

The CO issued the Final Determination on November 1, 1994 (AF 49-52), denying certification because the Employer has not met her burden of proof by establishing that the position meets the definition of full-time employment pursuant to 20 C.F.R. § 656.3.

On November 30, 1994, the Employer requested review of the Denial of Labor Certification (AF 65). On March 24, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

to support a conclusion. In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989).

In this case, the CO asked that the Employer supply specific information regarding the job opportunity (AF 36-37). Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly and the length of time required to prepare the meals and the number of people for which the meals are prepared; (2) the frequency of household entertaining in the 12 calendar month period immediately preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parents, the school schedules of the children, and how the children are cared for during the Alien's scheduled time off; and, (5) who will perform the general household maintenance duties such as cleaning, clothes washing, vacuuming, etc.

In her rebuttal, the Employer responded that she lives with her mother and eight-year-old daughter, and that the cook would only be required to provide meals for those three individuals (AF 43). She explained that she has her own business and works from 8:30 a.m. until 4:30 p.m., Monday through Friday.[2] Furthermore, the Employer stated that her daughter starts school at 9:00 a.m. and returns home at 3:30 p.m. She stated that her daughter does not require care by others and that her mother helps if necessary. The Employer stated that she never employed a cook in the past as the duties were previously performed by herself, her mother, her ex-husband, and her aunt, who is currently helping with the cooking and cooking-related duties (AF 42). She explained that the arrangement with her aunt is temporary and, due to an increased workload, she can no longer perform these duties. Furthermore, the Employer stated that her mother cannot perform the cooking duties because she has health problems. The Employer explained that the cook will not perform any duties other than cooking and she will not be required to cook for the purpose of entertaining. Finally, the Employer provided a typical schedule that the Cook will be required to follow, including estimated preparation times. In summary, the Cook will be required to prepare 15 breakfasts, 10 lunches, 20 sandwiches, and 15 dinners per week (AF 41).

As indicated, the issue here is whether or not the CO's conclusion, that full-time employment is not being offered, is a reasonable inference from these facts. However, we are unable to make that determination at this time, as the CO has raised two new issues for the first

[2] The Employer further explained that the location of her business allows her to eat her meals at home.

time in the Final Determination. First, the CO noted that the Employer's rebuttal indicated that breakfast will be served at 8:30 a.m. (AF 49, 42). However, the Employer later stated that she begins work at 8:30 a.m. (AF 43). As such, the CO found that the Employer's work schedule contradicts the cook's breakfast schedule (AF 49). However, we note that the Employer also stated that the location of her work also allows her to eat all of her meals at home (AF 42). Therefore, we find that the CO should have given the Employer an opportunity to explain this discrepancy by issuing a second NOF. Second, the CO noted that the Alien would be cooking for herself, her mother, and her daughter (AF 49, 43). However, the Employer later stated that the Cook will be required to prepare hot sandwiches for her mother, as well as her mother-in-law (AF 49, 41). The CO, in the FD, then found that:

> [i]t would appear, based on the cooking schedule submitted, that the employer's mother-in-law visits everyday. If the employer's mother-in-law visits every day, it would seem feasible that the employer's mother-in-law could help the employer or the employer's mother with the household cooking duties.

Again, we find that the CO should have issued a second NOF to give the Employer an opportunity to respond to this new issue. Accordingly, this matter must be remanded for the Certifying Officer to issue a new NOF and permit the Employer an opportunity to rebut.

However, we are also concerned that this job opportunity contains a requirement for two years of specialized cooking experience which could be considered to be unduly restrictive. The job requirements include two years of experience in the job duties of Kosher cooking. The practical effect of this requirement is to eliminate any U.S. applicant with two years of cooking experience, but no experience in Kosher cooking. Therefore, this matter will be remanded with instructions to the CO to consider whether the Employer's requirement of two years of experience in cooking Kosher foods is unduly restrictive, thus requiring a showing of business necessity in accordance with 20 C.F.R. § 656.21(b)(2)(i)(B), which provides that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States as defined in the *Dictionary of Occupational Titles* (DOT).

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further action in accordance with this decision.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

Judge Holmes, concurring:

I concur with the conclusion reached by the majority. On remand, I would direct the CO's attention, as well as Employer/Alien, to the case of *Teresita Tecson*, 94-INA-014 (May 30, 1995), wherein it was held that a three-month requirement for experience in Filipino cooking was found unduly restrictive. My research reveals no cases of "specialty" or "ethnic" domestic cook cases decided by the Board to the contrary. In my opinion, the burden of demonstrating that the requirement of an "ethnic" type of cooking such as "kosher cook" for a cook/domestic is high, since as stated in *Tecson*, "The business in this case is the operation of the household." If an employer "prefers" a certain type of cooking, he can, of course, instruct the cook to do so. However, to require such experience as a part of the job opportunity has a "chilling effect" on U.S. workers who might otherwise be qualified and willing to do the job.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.